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IN THE SUPREME COURT OF PENNSYLVANIA,
WESTERN DISTRICT

No. 212, March Term, 1950

JAY A. MINICH, FRED R. SPENCE AND E. P. BURK,
Appellants,

vs.

CITY OF SHARON AND WESTINGHOUSE ELECTRIC CORPORATION

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, *Jay A. Minich, et al., Appellants,* herewith submit their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

I

Basis upon Which It Is Contended that the Supreme Court of the United States Has Jurisdiction upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Pennsylvania, a review of which is sought by this appeal, was dated and

filed on January 2, 1951 and made final on January 17, 1951 by the refusal of said Court of a petition for reargument, seasonably filed. It is a final judgment in a suit in the highest court of the State of Pennsylvania in which a decision in the suit could be had. In this suit there was drawn in question the validity of an ordinance of the City of Sharon, Pennsylvania on the ground of its being repugnant to the Constitution of the United States. A decision on this question was necessary to the determination of the case, and the decision was in favor of its validity. A city ordinance is a "law" of the state within the meaning of the Act of Congress, approved June 25, 1948, 28 U. S. C. Sec. 1257(2), providing for review of a judgment of the highest court of a state. *Zucht* v. *King*, 260 U. S. 174. Accordingly, the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

II

Statutory Provision Believed to Sustain the Jurisdiction

The statutory provision believed to sustain jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Sec. 1257(2) of the 1948 Revision of the Judicial Code, 28 U. S. C. A. 1257(2).

III

The Statute of the Commonwealth of Pennsylvania the Validity of Which Is Involved

This ordinance of the City of Sharon, Pennsylvania, which was held to be valid but which the Appellants contended was repugnant to the Constitution of the United States was enacted on January 10, 1950 by the Council of the City of Sharon assessing a tax of 10 mills per dollar of income

earned by residents of the City after January 1, 1950 and also of 10 mills per dollar on income earned after that date by non-residents of the city, for work done or services performed in the city.

Though uniform *on its face*, said ordinance is being enforced 10 mills on the wages of non-residents but only 5 mills on the wages of residents. Since January 1, 1950 Appellants' employer, Westinghouse Electric Corporation, has withheld from the salaries of Appellants, nonresidents of the City of Sharon, 10 mills but has deducted only 5 mills for the city tax from the wages earned by residents of the City of Sharon.

A city ordinance is a "law" of the state within the meaning of the Act of Congress, approved June 25, 1948, 28 U. S. C. Sec. 1257(2), providing for review of a judgment of the highest court of a state. *Zucht* v. *King*, 260 U. S. 174.

The main section of the ordinance reads as follows:

Section 2. Imposition of Tax:

> "(2) An annual tax for general revenue purposes of ten (10) mills on each dollar is hereby imposed on (a) salaries, wages, commissions and other compensation earned on and after January 1, 1950, by residents of the City of Sharon; and on (b) salaries, wages, commissions and other compensation earned on and after January 1, 1950 by non-residents of the City of Sharon for work done or services performed or rendered in the City of Sharon; and on (c) the net profits earned on and after January 1, 1950, of businesses, professions or other activities conducted by such residents; and on (d) the net profits earned on and after January 1, 1950, of businesses, professions or other activities conducted in the City of Sharon by non-residents."

IV

Date of the Judgment Sought to Be Reviwed and of Application for Appeal

The judgment of the Supreme Court of Pennsylvania sought to be reviewed was dated and filed on January 2, 1951.

A petition for reargument was filed by Appellants in the Supreme Court of Pennsylvania on January 11, 1951, which petition was duly entertained and was refused on January 17, 1951.

The application for appeal was presented on April 2, 1951.

V

Statement Showing that the Nature of the Case and Rulings of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied On.

The Appellants are residents of Mercer, Greenville and Grove City, Pennsylvania, and are employed in the Westinghouse Electric Corporation in the City of Sharon, Pennsylvania.

Beginning January 1, 1950 the City of Sharon instructed their employer to withhold *10 mills* from the wages of Appellants, *non-residents* of the City of Sharon, to be turned over to the City of Sharon. For the same period, since January 1, 1950, Westinghouse Electric Corporation has deducted *only 5 mills* from the wages and earnings of *residents*, to be turned over to the City of Sharon.

The Appellants thereupon filed a Bill in Equity in the Court of Common Pleas of Mercer County, Pennsylvania contending, inter alia, that said Income Tax Ordinance, as enforced, was unreasonable and discriminatory.

The trial court upheld Appellants' contention and as a Conclusion of Law ruled that both the Federal Constitution and the Constitution of Pennsylvania prohibits a levy upon non-residents in excess of the levy upon residents, and enjoined the City of Sharon from collecting a city tax in excess of a rate of 5 mills upon wages of non-residents, earned within the City of Sharon.

On appeal, by the City of Sharon, to the Supreme Court of Pennsylvania from the rulings and judgment of the trial court, the Supreme Court of Pennsylvania reversed the judgment of the trial court and thereby overruled the contentions made by Appellants, and the Conclusion of Law of the trial court and thus upheld the validity of the taxing ordinance, as enforced, the City of Sharon, however, to pay the costs.

VI

The Stage in the Proceedings in the Court of First Instance and in the Appellate Court, at Which, and the Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised, the Method of Raising Them, and the Way in Which They Were Passed upon by the Court; the Rulings of the Court Therein to Show that the Case Is Brought Within the Statutory Provision Believed to Confer Jurisdiction on This Court.

The Federal question of unconstitutionality under the 14th Amendment was first raised in the trial court. The trial court in its first opinion stated as follows: (R. 17a)

> "Plaintiffs also complain that the consequence of the levy, as to plaintiff, is prohibited by the Fourteenth Amendment of the Constitution of the United States."

Further on in its opinion the trial court stated its position succinctly as follows: (R. 37a)

> "Briefly stated, our conclusion is that (in consequence of the resolution of the school district) the stat-

ute limited to five mills any levy by the city upon the wages of residents, and, that being so, both the Federal Constitution and the Constitution of Pennsylvania prohibit a levy upon non-residents in excess of the levy upon residents."

The trial court upheld Appellants contention and as its second Conclusion of Law ruled as follows: (R. 45a)

> "2. In consequence of the levy by the Sharon School District the statute limited to five mills any levy by the city upon the wages of residents, and, that being so, both the Federal Constitution and the Constitution of Pennsylvania prohibits a levy upon non-residents in excess of the levy upon residents."

and thereupon issued an injunction against the City of Sharon from collecting a city wage tax *in excess* of a rate *5 mills* upon wages of non-residents earned within the City of Sharon, thereby making the amount paid by residents and non-residents uniform (5 mills).

The City of Sharon thereupon appealed to the Supreme Court of Pennsylvania and these questions were raised in the briefs and arguments before that court.

On the appeal the City of Sharon (then the Appellant) in conformity with Rule 22 of the Supreme Court of Pennsylvania filed as one of its three questions to be argued the following:

> "Did the court err in its second conclusion of law that in consequence of the levy by the Sharon School District of five mills on the wages of residents that both the Federal Constitution and the Constitution of Pennsylvania restricted the city to a tax collection upon the wages of non-residents to five mills?"

Therefore the Supreme Court of Pennsylvania in its opinion reversing the trial court clearly overruled these

questions and upheld the validity of the taxing ordinance, as enforced.

VII

Statement of the Grounds upon Which It Is Contended that the Questions Involved Are Substantial

The constitutional questions decided by the Supreme Court of Pennsylvania are substantial and important. They have been decided by the Supreme Court of Pennsylvania in a way not in accord with applicable decisions of the Supreme Court of the United States.

Here the City of Sharon is enforcing a *10 mill tax* on the wages of Appellants, *non-residents* of the City of Sharon, but only a *5 mill tax* on the wages of *residents*.

This is not in accord with applicable decisions of the Supreme Court of the United States. That Court by two companion cases decided the very same day laid down the rule clearly. In *Shaffer* v. *Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920), the court held that a state may impose a tax on income of non-residents, accruing within the state. But the court clearly pointed out that the burden on non-residents could not be greater. At page 225 the court said:

> "And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders."

In *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 S. Ct. 228 (1920), the corollary case, the Supreme Court made the distinction clear when it held the New York In-

come Tax Law invalid and discriminatory as against non-residents working in New York because the incomes of residents and non-residents were not treated the same (an exemption of $1000.00 was given the residents of New York but non-residents had no similar exemption). The court said at page 232:

> "They (non-residents of New York) pursue their several occupations side by side with residents of the state of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference, Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer, but a general rule, operating to the disadvantage of all non-residents."

The same reasoning controls the case before us, only more so. If such a discrimination is invalid across state lines, surely it cannot be sustained where the fellow workers live in the same county. The City of Sharon has the power to tax the wages of non-residents, but cannot make the burden more onerous. To tax the wages of residents at one-half the rate of non-residents is exactly the same thing as giving residents an exemption of one-half their wages. This cannot be done.

The constitutional questions decided by the Supreme Court of Pennsylvania are substantial and important. They are questions of considerable public importance not only because many thousand non-resident workers are affected

by this particular decision but because cities and municipalities not only in Pennsylvania but in other states as well, are enacting income tax laws. For example, the City of Philadelphia has had a city income tax for several years, and this year it is expected to raise 44 million dollars, but the rate is *uniform* between wages of residents and wages of non-residents, earned in the city.

The Sharon ordinance has an added significance when it is realized that Sharon is located right at the Western Pennsylvania border, and that many Ohio residents presumably are employed in the Sharon industrial plants. 10 mills wage tax is withheld from their pay.

Here, it is important that the trial court, Hon. George H. Rowley, who is close to the practical operation of the ordinance has seen fit to make an order making the collection *5 mills* both as to residents and non-residents, but the Supreme Court of Pennsylvania has reversed that decision.

The Supreme Court of the United States has ruled, in *Travis* v. *Yale & Towne Mfg. Company* 252 U. S. 60, 40 S. Ct. 228, that the income tax burden on non-residents of a state, working in the state, could not be more onerous in its effect. We believe this rule is also clearly applicable to a city income tax, until the Supreme Court of the United States should so otherwise decide.

In the instant case, although the tax rate on both resident and non-resident wages is 10 mills, on the face of the ordinance, the allowance of certain reductions to residents that are not allowed to non-residents produces a lower tax rate for residents.

In passing on a state tax question we are concerned only with its practical operation not its definition or the precise form of descriptive words which may be applied to it, as held in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556.

Opinions

We are including in the Appendix hereto, copy of the opinion of the Supreme Court of Pennsylvania in the instant case.

Conclusion

We, therefore, respectfully submit that the questions arising in this case under the Constitution of the United States are substantial; that the decision of the Supreme Court of Pennsylvania reversing the decision of the Common Pleas Court of Mercer County, Pennsylvania, should be reversed; and that an appeal should be allowed in order that this may be done.

McBride and McBride,
(Signed) M. L. McBride,
211 South Center Street,
Grove City, Pennsylvania,
Attorneys for Appellants.

March 21, 1951

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

No. 212 March Term, 1950

JAY A. MINICH, FRED R. SPENCE AND E. P. BURR

v.

CITY OF SHARON, Appellant, AND WESTINGHOUSE ELECTRIC CORPORATION

Appeal of City of Sharon from Order of the Court of Common Pleas of Mercer County at No. 1 June Term, 1950, in Equity.

OPINION OF THE COURT—Filed January 2, 1951

HORACE STERN, J.

Plaintiffs are residents of the Boroughs of Mercer, Greenville and Grove City, Mercer County, respectively, but are employed by the Westinghouse Electric Corporation at its plant in the City of Sharon in that county. They have brought a bill in equity against the City of Sharon and the Westinghouse Electric Corporation seeking an injunction against their collecting from plaintiffs a wage tax imposed by the city so far as it is in excess of the rate of 5 mills on each dollar of wages earned by them at the Westinghouse plant. The court below—in our opinion erroneously—issued the injunction.

On June 27, 1949 the Board of School Directors of the School District of the City of Sharon adopted a resolution imposing a tax of 5 mills per dollar of income earned by residents of the School District for the period January 1, 1950 to July 2, 1950. On January 10, 1950 the Council of the City of Sharon enacted an ordinance assessing a tax of 10 mills per dollar of income earned by residents of the city after January 1, 1950, and also of 10 mills per dollar on income earned after that date by non-residents of the city for work done or services performed in the city. Under

this ordinance the City of Sharon is attempting to collect the 10 mills tax from such non-residents working in the city as are not subject to an income or wage tax at their places of residence, but only a 5 mills tax from residents of the city because of the latter being compelled to pay also the 5 mills tax to the School District of the City of Sharon, which School District is coterminous with the city. Plaintiffs allege that this works an illegal discrimination in favor of residents of the city as against such non-residents employed there, being in violation of Article IX, section 1 of the Constitution of the Commonwealth which provides that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax." They assert, therefore, that they should not be required to pay a tax of more than 5 mills, the same as is paid by residents of the city.

The Act of June 25, 1947, P.L. 1145, gave authority to certain political subdivisions to levy such taxes on persons, occupations and subjects within the limits of such political subdivisions as it should determine, provided only that such taxes should not be imposed on any person, occupation or subject, which then was or thereafter became subject to a State tax. It is under the authority of that Act that these taxes were imposed by the City of Sharon and by the School District of the City of Sharon. Section 5 of the Act provides that "Payment of any tax on . . . wages . . . to a political subdivision by residents thereof pursuant to an ordinance or resolution passed or adopted under the authority of this act shall be credited to and allowed as a deduction from the liability of such persons for any other like tax . . . on . . . wages . . . imposed by any other political subdivision of this Commonwealth under the authority of this act." This section of the Act was construed by the Superior Court in *Glen Alden Coal Company* v. *Thomas*, 165 Pa. Superior Ct. 199, 67 A.2d 754, as meaning that a taxpayer may credit any wage tax paid by him to the borough or school district of his residence against any tax levied by a municipality of which he is not a resident but in which his wages are earned, but may not assert such a credit against a tax levied by another political subdivision of

which he is also a resident. As applied to the present situation, therefore, it is clear that the City of Sharon must allow a credit as against its 10 mills tax to any non-resident paying a tax on the same wages to another political subdivision of which the taxpayer is a resident. As far as plaintiffs in the present proceedings are concerned, however, it is not claimed that they are taxed on their wages earned in the City of Sharon by the respective political subdivisions of which they are residents, and, therefore, they have not shown any right to the allowance of a credit but must pay the full 10 mills tax imposed by the city's ordinance.

Allowing a credit against the payment of a tax for taxes paid to some other governmental authority is not a violation of the constitutional requirement of uniformity. In *Florida v. Mellon, Secretary of the Treasury*, 273, U. S. 12, it was held by the Supreme Court of the United States that a provision in the Revenue Act of 1926 allowing a credit on the tax thereby imposed (up to 80% thereof) for the amount of any estate or inheritance taxes paid to any State was constitutional and valid. In that case the State of Florida contended that under the constitution of Florida no tax on inheritances could be levied by the State or under its authority and that the Federal tax was therefore not uniform because the citizens of other States profited by the allowance of the credit while Florida obtained no benefit therefrom. The court rejected that contention. In *Steward Machine Company v. Davis, Collector of Internal Revenue*, 301 U. S. 548, it was argued that the Social Security Act of 1935 was invalid as discriminatory because it allowed to the taxpayer credit against the federal tax (up to 90% thereof) for what he had contributed during the tax year under any state unemployment law. The Supreme Court of the United States again held that the allowance of such a credit did not involve any illegal departure from the requirement of uniformity. The present federal income tax law, as we all know, allows credit deductions from the taxable income base for taxes paid by the taxpayer under local laws, but no one has successfully contended that these credit allowances, varying as they necessarily do among different individuals and among different States, involve a violation of Article I,

Section 8 of the Constitution of the United States that "all duties, imposts and excises shall be uniform throughout the United States." In *Erie* v. *Griswold*, 5 Pa. Superior Ct. 132, it was held that an act authorizing a city, which imposed the cost of paving streets in whole or in part upon abutting property owners, to allow the latter an abatement of their general city taxes on the same property equivalent to a portion of the assessment for the paving improvement, did not offend against the constitutional provision of the Commonwealth (Article IX, section 1) requiring uniformity of taxation. The decision of the Superior Court in that case was affirmed, per curiam, on the opinion of that court, in 184 Pa. 435, 39 A. 231. In *Franklin* v. *Hancock*, 18 Pa. Superior Ct. 398, it was similarly held that the provision of an act that a property owner should be reimbursed for paving assessments by rebates out of road taxes did not render the act unconstitutional. That decision was also affirmed, per curiam, on the opinion of the Superior Court, in 204 Pa. 110, 53 A. 644. The credits provided for in the Act of June 30, 1947, P.L. 1149, are all the more legally justified because the tax for which the credit is allowed is on the same subject as the tax against which the allowance is made.

It has already been stated that the Act of 1947 allowed credits to non-residents of the political subdivision imposing the tax but made no such provision for the benefit of taxpayers who were residents of a political subdivision coterminous with the political subdivision imposing the tax and were therefore residents of both. This situation was remedied by the amendatory Act of May 9, 1949, P.L. 898, which added to the Act of 1947 a subsection providing that no taxes should be levied by any political subdivision exceeding a rate of 1% on wages, and that "If at any time two political subdivisions shall impose any one of the above taxes (inter alia, on wages) on the same person, subject, business, transaction or privilege, located within both such political subdivisions, during the same year or part of the same year, under the authority of this act, then the tax levied by a political subdivision under the authority of this act shall, during the time such duplication of the tax exists, except as

hereinafter otherwise provided, be one-half of the rate, as above limited, and such one-half rate shall become effective by virtue of the requirements of this act from the day such duplication becomes effective without any action on the part of the political subdivision imposing the tax under the authority of this act. It is the intent and purpose of this provision to limit rates of taxes referred to in this subsection so that the entire burden of one tax on a person, subject, business, transaction or privilege shall not exceed the limitations prescribed in this subsection: Provided, however, That any two political subdivisions which impose any one of the above taxes on the same person, subject, business, transaction or privilege during the same year or part of the same year may agree among themselves that, instead of limiting their respective rates to one-half of the maximum rate herein provided, they will impose respectively different rates, the total of which shall not exceed the maximum rate as above permitted." Thus, carrying out the same intention as shown in section 5 of the Act of 1947, this amendment provides that where the person or the subject of taxation is located within both of two political subdivisions —as in the present instance in the case of residents of the City of Sharon and of the School District of the City of Sharon—there must not be a duplication or aggregation of taxes exceeding the permissible limit, but consideration must be given by the one political subdivision to the tax imposed by the other. Here, therefore, the tax imposed by the School District of the City of Sharon being at the rate of 5 mills, what may be regarded as a credit to that amount must be allowed on the 10 mills tax imposed by the City of Sharon. While the language in the 1949 Act is not cast into the same form as that in section 5 of the Act of 1947, in that the word "credit" is not employed, in practice the same result is accomplished in the case of a taxpayer resident in both of two coterminous political subdivisions as in the case of one resident in one political subdivision and employed in another. If the residents of the School District of the City of Sharon were, instead, residents of the Borough of Mercer, Greenville or Grove City, as these plaintiffs are, and they were there taxed 5 mills on the wages earned by

them in the City of Sharon, they would be entitled to the same allowance in that amount as that now credited them by reason of the tax imposed upon them by the School District of the City of Sharon. There is therefore no such classification between residents and non-residents of the City of Sharon as plaintiffs envisage.

The provision in the Act of 1949 that the tax imposed by a political subdivision on a subject located both in it and another political subdivision shall be reduced to one-half of the rate is obviously designed merely to secure for those taxpayers *who are residents of both such political subdivisions* a proper allowance of credit; it does not mean that the tax so imposed is automatically reduced to one-half as against persons *who are residents of some other political subdivision.*

The order of the court below is reversed, the City of Sharon, however, to pay the costs.

FILED
MAY 19 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 745

JAY A. MINICH, FRED R. SPENCE AND E. P. BURK,
Appellants,

v.

CITY OF SHARON AND WESTINGHOUSE ELECTRIC CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

NATHAN ROUTMAN,
WILLIAM H. ECKERT,
Counsel for Appellees.

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IN THE SUPREME COURT OF PENNSYLVANIA.
WESTERN DISTRICT

MARCH TERM, 1950

No. 212

JAY A. MINICH, FRED R. SPENCE AND E. P. BURK,
Appellants,

v.

CITY OF SHARON AND WESTINGHOUSE ELECTRIC CORPORATION

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause for its statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that an ordinance of the City of Sharon

enacted January 10, 1950 levying a uniform ten (10) mill tax on each dollar of wages, salaries, compensation and net profits earned by both residents and non-residents of the City is contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States because in the enforcement of the ordinance, an allowance of credit is granted to residents of a coterminous school district resulting in an alleged illegal discrimination between residents and non-residents of the City. These claims the appellees deny and the State Supreme Court in the opinion and judgment herein challenged, determined the question so raised by appellants adversely to them.

The Act of June 25, 1947, P. L. 1145, as amended by the Act of May 29, 1949, P. L. 898 enacted by Pennsylvania State Legislature, authorized the levy in question.

Section 1(e) of the 1949 Act provides:

> "No taxes shall be levied by any political subdivision on the following subject exceeding the rates specified in this subsection:
>
> (c) on wages, salaries, commissions and other earned income of individuals 1%."

Section 5 of the 1947 Act provides:

> "Payment of any tax on *** wages *** to a political subdivision by residents thereof pursuant to an ordinance or resolution passed or adopted under the authority of this Act shall be credited to and allowed as a deduction from the liability of such persons from any other like tax * * * on wages * * * imposed by any other political subdivision of this Commonwealth under authority of this Act."

Section 1(e) of the amendatory Act further provides:

> "If at any time two political subdivisions shall impose any one of the above taxes (inter alia, on wages) on the same person, subject, business, transaction or privilege, located within both such political sub-

divisions, during the same year or part of the same year, under the authority of this act, then the tax levied by a political subdivision under the authority of this act shall, during the time such duplication of the tax exists, except as hereinafter otherwise provided, be one-half of the rate, as above limited, and such one-half rate shall become effective by virtue of the requirements of this act from the day such duplication becomes effective without any action on the part of the political subdivision imposing the tax under the authority of this act. It is the intent and purpose of this provision to limit rates of taxes referred to in this subsection so that the entire burden of one tax on a person, subject, business, transaction or privilege shall not exceed the limitations prescribed in this subsection: Provided, however, That any two political subdivisions which impose any one of the above taxes on the same person, subject, business, transaction or privilege during the same year or part of the same year may agree among themselves that, instead of limiting their respective rates to one-half of the maximum rate herein provided, they will impose respectively different rates, the total of which shall not exceed the maximum rate as above permitted."

On June 27, 1949, the Board of School Directors of the School District of the City of Sharon adopted a resolution imposing a tax of 5 mills per dollar of income earned by residents of the School District for the period January 1, 1950 to July 2, 1950.

On January 10, 1950, the City of Sharon levied its 10 mill tax for the calendar year 1950.

That portion of the decision of the Supreme Court of Pennsylvania from which this appeal is attempted to be taken and as set forth in appellant's statement of jurisdiction reads as follows:

"Thus, carrying out the same intention as shown in Section 5 of the Act of 1947, this amendment provides that where the person or the subject of taxation

> is located within both the two political subdivisions—as in the present instance in the case of residents of the City of Sharon and of the School District of the City of Sharon—there must not be a duplication or aggregation of taxes exceeding the permissible limit, but consideration must be given by the one political subdivision to the tax imposed by the other."

Thus, the ordinance herein under attack was a constitutional exercise of the taxing power of the City of Sharon:

1. Because the income taxes levied and its enforcement are in strict conformity with the provisions of the 1947 and 1949 Acts, above quoted, the constitutionality of which are conceded.

2. Because the income taxes levied and enforced are uniform and non-discriminatory.

3. Because both residents and non-resident taxpayer, subject to the mandates of the ordinance, pay a like amount of tax in the aggregate under the controlling provisions of the statutes above quoted.

II

Statement Showing the Lack of Jurisdictional Requirements

The statutory provisions relied upon by appellant do not sustain the jurisdiction of the Supreme Court of the United States in that no attack is made upon the statutes under which the ordinance here under question was enacted.

It is conceded by appellant that the Act of 1947 and the Act of 1949, above quoted, are constitutional.

The trial court said as follows (Record 17):

> "It will be important to keep in mind that plaintiffs do not attack the statute under which the City assumed to act . . ."

The appellant in its "Statement as to Jurisdiction" states (Page 3):

> "In the instant case, although the tax rate on both resident and non-resident wages is 10 mills, on the face of the ordinance, the allowance of certain reductions to residents that are not allowed to non-residents produces a lower tax rate for residents."

The "allowance of certain reductions" is not by virtue of any of the provisions of the ordinance, which is uniform in its scope, but because the Act of 1949 mandatorily provides for the automatic reduction were duplication of taxes exist between coterminous political subdivisions.

The State Supreme Court in its decision in the instant case said:

> "The provision in the Act of 1949 that the tax imposed by a political subdivision on a subject located both in it and another political subdivision shall be reduced to one-half of the rate is obviously designed merely to secure for those taxpayers *who are residents of both such political subdivisions* a proper allowance of credit; it does not mean that the tax so imposed is automatically reduced to one-half as against persons *who are residents of some other political subdivision.*

Thus the ordinance under attack was drawn, the levy made and the tax liabilities *enforced* in strict compliance with the statutes above quoted, the constitutionality of which are unquestioned.

If the statutes are constitutional, then the ordinance of the City levying the tax must of necessity be constitutional for it was drawn and enforced in conformity with the delegated authority.

A City has no inherent power to tax for that power vests exclusively in the sovereign. The Commonwealth may delegate certain of its taxing powers to a municipality but the authority so delegated is limited strictly to the terms of the grant in the statute conferring it.

Consequently, the only question that could be involved in the instant appeal would be the constitutionality of the statutes by virtue of which the ordinance under attack was enacted. Since this question was neither raised in the lower court nor in the State Supreme Court the appellant is without authority to invoke the jurisdiction of the Supreme Court of the United States.

III

No Substantial Federal Question Is Presented by the Attempted Appeal

The appellant relies on the following cases to sustain the jurisdiction of this appeal:

Shaffer v. *Carter*, 252 U. S. 37 (1920);
Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920).

Briefly, in both the *Shaffer* and *Travis* cases it was held that income taxes levied on residents and non-residents of the state could not be more onerous upon incomes accruing to non-residents from their property or business within the state than upon residents. In the *Travis* case an exemption of $1,000 given residents was denied non-residents of the state.

Clearly those cases are distinguishable from the instant one. In the *Shaffer* and *Travis* cases, "non-residents" were non-residents of the state. In the present case, "non-residents" are residents of the state whose legislature enacted the statutes under which the ordinance in question was passed.

All the parties to these proceedings are residents of the Commonwealth of Pennsylvania and are governed by its statutes. The ostensible purposes of the statutes above quoted were, *inter alia*, to prevent duplication of income taxes between political subdivisions and to provide that a taxpayer subject to the same tax in more than one political

subdivision would not be required to pay more than 1% in the aggregate.

In the instant case all taxpayers pay a like amount of tax. For example if the Boroughs of Greenville, Grove City and Mercer, Pennsylvania enacted a 10 mill income tax, under Section 5 of the statute, above quoted, the City of Sharon would collect nothing from the appellants. Further, residents of the City of Sharon pay a like tax as non-residents of the City, except that the 10 mills collected from residents is equally divided between the City of Sharon and the School District of Sharon by virtue of Section 1 (e) of the 1949 Act above quoted.

The Supreme Court of Pennsylvania in its decision succinctly stated this proposition as follows:

> "If the residents of the School District of the City of Sharon were, instead, residents of Mercer, Greenville and Grove City, as these plaintiffs are, and they were taxed 5 mills on the wages earned by them in the City of Sharon, they would be entitled to the same allowance in that amount as that now credited them by reason of the tax imposed upon them by the School District of the City of Sharon."

The State Legislature has the authority to enact taxing laws that will effectuate the distribution of tax proceeds among its cities and towns for local public purposes.

Knights v. *Jackson*, 260 U. S. 12 (1922).

In determining whether a tax is within the state's constitutional power, the courts will look to the incidence of the tax and its practical operation.

International Harvester Co. v. *Wisconsin Department of Taxation*, 322 U. S. 435 (1944).

The "practical operation" of the statutes herein involved is to permit local municipalities to enact income taxes not to exceed 1% limiting the levy, however, to a priority

between and among municipalities based on the residence of the taxpayer for the taxes collected and further prohibiting the aggregate of the taxes levied by two municipalities on any one person or business from exceeding the maximum limitation by providing for allowances of credits between them.

Allowing a credit against the payment of a tax for taxes paid to some other governmental authority is not a violation of the constitutional requirement of uniformity.

Florida v. *Mellon, Secretary of the Treasury*, 273 U. S. 12, (1926).

Steward Machine Company v. *Davis, Collector of Internal Revenue*, 301 U. S. 548 (1937).

It is respectfully submitted that since both residents and non-residents of the City of Sharon both pay in the aggregate a like amount of taxes, to wit, 10 mills on each dollar earned, the appellants have not established the proposition of illegal discrimination which would be violative of the Fourteenth Amendment of the Constitution of the United States.

We further submit that the question presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed or that the judgment and order of the Supreme Court of Pennsylvania be affirmed.

NATHAN ROUTMAN,
WILLIAM H. ECKERT,
Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 745

JAY A. MINICH, FRED R. SPENCE and E. P. BURK, Appellants,

v.

CITY OF SHARON and WESTINGHOUSE ELECTRIC CORPORATION.

BRIEF FOR APPELLANTS OPPOSING MOTION TO DISMISS OR AFFIRM

On Appeal from the Supreme Court of Pennsylvania.

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v.

CITY OF SHARON and WESTINGHOUSE ELECTRIC CORPORATION.

BRIEF FOR APPELLANTS OPPOSING MOTION TO DISMISS OR AFFIRM

On Appeal from the Supreme Court of Pennsylvania.

The Appellants in the above entitled cause in opposition to Appellee's motion to dismiss or affirm, respectfully show the following:

I. STATEMENT OF ISSUE ON APPEAL.

Here the City of Sharon is collecting a city wage tax of *10 mills* from Appellants, *non-residents* employed in Sharon, while collecting *only 5 mills* from *residents* of Sharon.

In *Shaffer v. Carter*, 252 U.S. 37 and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, the Supreme Court of the United States held that such a discrimination was invalid as to residents and non-residents *of a state*, and that the burden on non-residents could not be greater.

We believe this rule is also clearly applicable to a city income tax until the Supreme Court of the United States should so otherwise decide. That is the precise issue involved. If such a discrimination is invalid across state lines, it should not be upheld where the fellow-workers live in the same county.

II. and III. THE JURISDICTIONAL REQUIREMENTS ARE PRESENT AND THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

The Appellants are attacking the ordinance as discriminately enforced, 10 mills and 5 mills. They do not seek to have the whole ordinance or statute declared invalid but merely have the rate uniformly enforced, 5 mills both as to residents and non-residents, and the lower court so ordered.

The ordinance in question was passed under the authority of the Act of June 25, 1947, P. L. 1145, as amended by the Act of May 29, 1949, P. L. 898, enacted by the Pennsylvania State Legislature.

Section 5 of the 1947 Act, set forth in Appellee's motion to affirm, provides a credit for the non-resident worker employed in Sharon if he has paid an income tax at his place of residence. In *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, there was a similar credit on the New York income tax if the non-resident worker paid

an income tax at his residence — for example in New Jersey.

Neither here nor in the *Travis* case was the *credit provision* for payments at the worker's residence under attack. Therefore, the decisions of the Supreme Court of the United States, cited by the Supreme Court of Pennsylvania, arising under "credit provisions" are not decisive of the issue before us.

As Appellee admits in its Statement Opposing Jurisdiction the court must look to the tax in its *practical operation and effect*. Mere definition or form of descriptive words does not control. *Lawrence v. State Tax Commission*, 286 U.S. 276, 280. Here the practical operation is that Appellants, non-residents, pay 10 mills while residents pay only 5 mills.

The City of Sharon admits the discrimination, but says the discrimination is caused by the automatic reduction feature of the state statute authorizing the ordinance. That is no defense. The city claims that its residents need pay only 5 mills since a tax of that amount also has been levied, on residents only, by the Sharon School Board and the State law sets a 10 mill limit on such taxes.

The reduction provision, Section 1 (e) of the 1949 Act provides that where two taxing units, namely a city and a school district, both impose the same type of tax, the tax rate shall automatically be reduced to "one-half of the rate * * * and such one-half rate shall become effective by virtue of the requirements of this Act from the day such duplication becomes effective without any action on the part of the political subdivision imposing the tax under the authority of this Act."

In the Supreme Court of Pennsylvania, Appellants (then Appellees) contended that since the city had levied a 10 mill wage tax and the School District a 5 mill tax, that the City tax rate had been reduced to 5 mills both as to residents and non-residents. But, the Supreme Court of Pennsylvania held that this reduction provision applied only to residents of Sharon, and therefore, though the one-half rate made the residents pay only 5 mills, Appellants, non-residents, still had to pay the full 10 mills.

It must be kept in mind, of course, that the City of Sharon and the School District are completely separate entities and independent taxing authorities.

Reducing the tax rate to "one-half the rate" for residents but not for non-residents is a discrimination that cannot be tolerated. It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common there should be a common contribution to discharge it.

53 *Corpus Juris Secundum* 547 states the rule as follows:—

> "As a general rule an unreasonable and arbitrary discrimination based on residence in invalid, even where the discrimination operates only within the limits of a municipality."

Can the City of Sharon say, "True, you as a resident of Grove City, Mercer or Greenville pay school taxes, including a per capita tax, at your place of residence, and true—you pay your own city taxes, and true—a resident of Sharon only pays 5 mills wage tax to support his own City government, but we are going to tax

you, Mr. Non-Resident, *twice as much*, or 10 mills, to support the government of the City of Sharon, purely because you happen to live outside the city limits?"

The City of Sharon contends that *if* the Boroughs of Greenville, Grove City, and Mercer, Pennsylvania, enacted a 10 mill income tax, under Section 5 of the statute (the credit provision), the City of Sharon would collect nothing from the Appellants. That is true since credit is given for payment to the city of residence. In *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 81, the Attorney General of New York made the very same argument, that New York looked forward to the adoption of an income tax by the adjoining states, in which event injustice to non-residents on the part of New York could be avoided. The Supreme Court answered this as follows:—

> "This however is wholly speculative; New York has no authority to legislate for the adjoining states; and we must pass upon its statute with respect to its effect and operation in the existing situation."

The same reasoning controls the case before us. The adjoining cities *could have* enacted an income tax and the discrimination would have disappeared. But that has not been done. Sharon cannot legislate for the adjoining cities.

The Supreme Court of Pennsylvania erred in not following the United States Supreme Court *Shaffer* and *Travis* cases and the decision of the trial court. The trial court, Hon. George H. Rowley, in deciding that the rate must be uniform, 5 mills both as to residents and non-residents, succinctly stated Appellants' position as follows (R. 34a):—

"The subject taxed by the City Ordinance is wages, wages of residents and wages of non-residents. Upon what rational basis can a discrimination rest which has for its object the subjection of wages of non-residents to a higher tax than that imposed on the wages of residents? Possibly a higher rate on residents might be justified upon the presumption that residents participate to a greater extent in benefits supplied by a city administration. If the City may impose a double burden of wages upon non-residents, it may impose the entire burden upon the latter to the complete relief of wages payable to residents."

The trial court went on in its opinion to hold as follows (R. 36a):—

"While the power of the city to impose a fair share of the cost of city administration upon wages earned within the city by non-residents must be conceded, we can find no reasonable justification for imposing a greater share than is borne by wages similarly earned by residents."

The City of Sharon contends in its motion to affirm that the Supreme Court of the United States does not have jurisdiction in that no direct attack is made on the statutes under which the ordinance here in question was enacted.

The Court has many times stated that a city ordinance is a "law" of the state within the Acts of Congress conferring jurisdiction.

Also, by attacking the ordinance as now enforced and construed by the Supreme Court of Pennsylvania,

an attack has been made on the authorizing statute. The ordinance can rise no higher than the statute authorizing it, *a fortiori* the reduction provisions of the statute are merged with and become a part of the ordinance.

IV. CONCLUSION.

Settlement of the question by this Court is plainly in the public interest, and will become more and more important, with the ever increasing use of city income taxes. It is submitted that such city income taxes should not discriminate against non-residents of the city, as has already been decided in regard to State income taxes.

Wherefore, Appellants submit that Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

M. L. McBane,
M. L. McBane, Jr.,
Attorneys for Appellants.

May 3, 1951.

No. 745. MINICH ET AL. v. CITY OF SHARON ET AL. Appeal from the Supreme Court of Pennsylvania. *Per Curiam*: The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *M. L. McBride* for appellants. *Nathan Routman* and *William H. Eckert* for appellees. Reported below: 336 Pa. 267, 77 A. 2d 247.